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THE TRIAL JUDGE'S GUIDE TO NEWS REPORTING AND FAIR TRIAL

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The author has been a Justice of the Supreme Court of the State of New York since 1959. He is presently serving as Vice-Chairman of the National Conference of State Trial Judges and as Chairman of the Conference's Special Committee on News Reporting and Fair Trial. Justice Meyer was a member of the Advisory Committee on Fair Trial and Free Press (Reardon Committee) to the American Bar Association Special Committee on Minimum Standards for the Administration of Criminal Justice. He has written numerous articles on the subject of this paper, and participated in many seminars and conferences concerning the issues raised herein. Justice Meyer was a participant in the 1962 Conference on Prejudicial News Reporting in Criminal Cases, conducted by Northwestern University School of Law and the Medill School of Journalism (Northwestern University).

As its title clearly implies, this article is intended as a guide for trial judges confronted by free press-fair trial dilemmas in actual practice. Justice Meyer describes the trial process from the pre-arraignment point to ultimate conclusion of the trial, with emphasis on those types of free press-fair trial problems a trial judge may expect to have to deal with at each stage of the proceedings. The author suggests alternatives to assure both the prosecution and the defendant a fair trial. Prerequisite to the effectiveness of any specific orders issued by a trial judge in a publicized case, however, will be the judge's communication to those concerned as to what, in his opinion, justice demands their respective roles should be. Only when each side understands the needs and rights of the other will each side respect and try not to infringe thereon. Justice Meyer stresses that each case involving appreciable amounts of publicity is in a class by itself, and cautions judges to frame appropriate orders in particular cases rather than attempting to adopt orders entered by other judges in other cases.

The contents of this article also appear, in substance, as a chapter in the second edition of the *State Trial Judge's Book*, published under the sponsorship of the National Conference of State Trial Judges.

One of the vexing problems for a judge handling a criminal trial, especially if a public figure is involved or there are bizarre aspects to the crime, is the effect of news reporting, whether in print or by broadcast media, upon the fairness of the trial. Whether such publicity in fact prejudices jurors has never been scientifically proven or disproven, though the matter is presently under study. A trial may, however, involve "such a probability that prejudice will result that it is deemed inherently lacking in due process."¹ The trial judge's responsibility to protect a defendant against such a probability of prejudice requires not only that he guard against any act or utterance on his own part that may tend to interfere with the right of the people or of the defendant to

a fair trial, but also that he act on his own motion to control influences that disturb the impartiality and judicial serenity of the trial. At the same time he can never lose sight of the role of the media to guard "against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."²

The delicate balance thus to be maintained between freedom of the press and the right to a fair trial requires understanding by the media of the rules of evidence and of substantive law governing the particular trial, and by the bench and bar of the purposes and problems of the media. For the individual judge this means development of an understanding and cooperative attitude toward the media, not, of course, to the point of revealing

¹ *Estes v. Texas*, 381 U.S. 532, 542 (1965).

² *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

what should not be revealed, but for the purpose of educating newsmen concerning legal rules and procedures and of learning from them the practical problems which beset them so that intelligent and intelligible procedures and orders relating to news coverage of a particular trial can be developed. Cooperation between bench and media, when each understands the responsibilities of the other, can provide a more complete answer to the problem of potentially prejudicial publicity than can orders or regulations. To deal generally with such matters, there have been established in a number of states, and there are in process of formation in a number of others, organizations variously known as Conferences, Councils or Committees, composed of representatives of both media and bar associations, judges, and law enforcement officials. Many such "Bar-Press" committees have adopted Statements of Principles and Guidelines concerning when publication of specific kinds of information should be delayed in order to assure a defendant a fair trial. Some such committees have developed cooperation to the fine point of establishing a Review Committee to which troublesome problems or guideline "infringements" are referred. A trial judge handling a sensational criminal trial should, therefore, first ascertain whether such a committee exists in his state, what principles and guidelines it has adopted, and what interpretations and applications of the guidelines have been made.

Other fertile sources of assistance and information are the Standards Relating to Fair Trial and Free Press approved by the American Bar Association House of Delegates on February 19, 1968, similar standards recommended by other state and local bar groups (e.g., the report of the Special Committee of the Association of the Bar of the City of New York, known as the Medina Committee), the standards adopted September 19, 1968, by the Judicial Conference of the United States,³ the Regulations issued by the Attorney General of the United States,⁴ and for juvenile court judges, the booklet published by the National Council on Crime and Delinquency entitled "Guides for Juvenile Court Judges on News Media Relations." The ABA Standards are reprinted in the American Bar Association Journal⁵ and can also be obtained in reprint form from the ABA Publications Office. A valuable adjunct to the

ABA Standards is the extensive commentary on the law which is set forth in the Tentative Draft of the Standards issued in December, 1966, and the commentary, explanatory of the revisions made, which appears in the Approved Draft of the Standards issued in March, 1968.

Basic to all of the standards, of course, are the decisions of the federal and state courts, and particularly the Supreme Court's decision in *Sheppard v. Maxwell*.⁶ It is upon the *Sheppard* decision and the ABA Standards that the material which follows is largely based.

THE PRE-ARRAIGNMENT STAGE

Where lies the authority to control disruptive influences at this stage is the first question that must be answered. The question has two aspects: (1) at what stage does judicial jurisdiction commence, and (2) what court should act.

The first is an issue of separation of powers. The *Sheppard* decision is equivocal on the point, stating that "the court should have made some effort to control the release of leads, information and gossip to the press by police officers, . . ." and that "the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by . . . especially the Coroner and police officers", but also that "the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees" and that "... enforcement officers coming under the jurisdiction of the court should [not] be permitted to frustrate its function."⁷ The ABA Tentative Draft presents the arguments supporting constitutionality of court orders regulating law enforcement officials;⁸ the Medina Report⁹ states the contrary arguments. The United States Judicial Conference found it unnecessary to take any position on the issue because it appeared to be covered adequately by regulations issued by the Attorney General,¹⁰ and the ABA Final Draft left the matter to regulation by law enforcement officials in the first instance, with the recommendation that if such agencies had not within a reasonable time adopted such a regulation, it should be made effective by court rule or legislation. It must,

³ Reported in full in the CONGRESSIONAL RECORD of Oct. 11, 1968, at S-12639-46.

⁴ 28 C.F.R. 50.2, the so-called "Katzenbach order."

⁵ 54 A.B.A.J. 347-51.

⁶ *Supra* note 2.

⁷ *Id.* at 359-60, 362-63.

⁸ At 101-06.

⁹ At 39-44.

¹⁰ *Supra* note 4.

of course, be recognized that the question may involve interpretation of state, as well as federal, constitutional provisions. Trial judges should encourage law enforcement agencies to adopt regulations of the type specified in ¶2.1 of the ABA Standards, and failing that should seek court rules or legislation as suggested. Moreover, before any trial judge seeks in an individual case to control the release of information by law enforcement officials at the prearrestment or preindictment stage, he should be satisfied (1) that neither federal nor state constitutional law proscribes his so doing,¹¹ (2) that the matter has not been dealt with adequately by regulation of the law enforcement agency or cannot be dealt with adequately by request to the executive (governor, county executive, mayor) of whose administration the law enforcement agency is a part, and (3) that the probability of prejudice to the accused is of such proportion that available correctives (continuance, change of venue) cannot reasonably be expected to establish a proper climate for the trial. If those three conditions are met, however, a trial judge should act, even at the prearrestment stage, to prevent prejudicial acts or statements by law enforcement officials.

Which judge should act at the prearrestment stage is a matter not of constitutional but of local procedural law. When the same court that will try the case sits on arrestment, or will receive the information or indictment, there is no problem. But most of the cases in which publicity is likely to become a problem will involve felonies, and in many states the court which tries felonies has no jurisdiction until the indictment is presented or an information filed, the initial arrestment of the accused being before another court. Absent a rule of the state's highest judicial authority, joint rules of the trial and arresting courts, or legislation dealing with the problem, such control of the release of information by law enforcement officials as is to be exercised by the judiciary at this stage is in the hands of the arresting court.

What has been written above with respect to law enforcement officials applies not only to police

officers, but also to the coroner or medical examiner and his staff, and other investigative or custodial personnel employed by government offices outside the judicial system. Judicial employees and lawyers, prosecution or defense, are, of course, responsible to the courts during the prearrestment period as well as at all other times. Where regulations governing judicial employees have not been adopted¹² and the necessity for direction to them during the prearrestment stage becomes apparent, a trial judge need have no hesitancy about issuing a specific order. The Canons of Professional Ethics contain specific provisions concerning statements by lawyers during the prearrestment period.¹³ Where the Canons have been adopted, or a similar rule of court is in force, a lawyer who acts in violation of the Canon or rule is subject to disciplinary action without the issuance of any order. Only in extreme cases, therefore, where contempt proceedings against a lawyer appear warranted will there be necessity for a specific order directed to lawyers during the pre-arrestment period.

It is emphasized that not every extrajudicial statement made by a lawyer, judicial employee, law enforcement or other governmental officer is prejudicial and that even prejudicial information may be disclosed when necessary to aid in an investigation, assist in the apprehension of a suspect, or warn the public of any dangers. Specification of information that should *not* be released and of statements which it *is appropriate* to make during the pendency of a criminal matter are set forth in ¶s 1.1 and 2.1 of the ABA Standards. While the specifications in those paragraphs are neither all inclusive nor mutually exclusive, they cover all of the situations that will normally arise, and may be used as guidelines for any order a trial judge decides it is appropriate to issue. Indeed, once the Code of Professional Responsibility incorporating the substance of ¶ 1.1 has been adopted in a particular state, a trial judge in that state may well content himself, with respect to that part of any order relating to lawyers that he decides to issue, with the incorporation by reference in his order of that portion of the Code.

¹² See ABA STANDARD ¶2.3.

¹¹ Of interest in this connection is *Younger v. Superior Court*, 393 U. S. 1001 (1969). Petitioner, the Los Angeles District Attorney, seeking to have vacated the order *re* publicity made in the *Sirhan* case, argued that the order was in excess of the court's jurisdiction. Petition for Certiorari, pp. 23-27. His application was denied without opinion by the Court of Appeals and the Supreme Court of California, and certiorari was denied by the United States Supreme Court.

¹³ ABA STANDARD ¶1.1 proposed a detailed revision of the Canons of Professional Ethics. The substance of that proposed revision was incorporated in Disciplinary Rule 7-107 of the Code of Professional Responsibility adopted by the ABA Special Committee on Evaluation of Ethical Standards, which is to be presented to the ABA House of Delegates for adoption in August, 1969.

Among the announcements deemed appropriate to make during this stage of the proceeding is a description of physical evidence seized. To the extent necessary to protect against improper release of exhibits containing any confession, admission or statement, the trial or arraigning judge may, subject to the separation of powers question discussed above, make an order impounding specified exhibits and proscribing the taking of any photographs of them except by the state or, when authorized by court order, by the defendant.

Under the circumstances of a given case, where there is no departmental regulation covering the posing of an accused for photographs or television or the granting of interviews to newsmen by a person in custody,¹⁴ a trial judge may find it necessary at this stage to issue an order prohibiting such posing or interviews, unless the accused consents in writing after being informed of his right to consult with counsel about the matter and to refuse to grant an interview.

THE POST-ARRAIGNMENT AND PRE-TRIAL STAGE

Everything stated above with respect to extra judicial statements, and the photographing and interviewing of the accused applies as well to the postarraignment period, the only differences being that there is less of a question concerning separation of powers, the matter then being pending before the court, and that the court before which the matter is pending is known, thus obviating any question of jurisdiction as between courts.

Pretrial Hearings

Whether evidence was illegally obtained, whether an identification was made under such unnecessarily suggestive circumstances as to make in-court identification excludable, whether a confession was voluntarily made, are all questions which must be determined, at least in the first instance, out of the presence of the jury. As the Supreme Court recognized in the *Sheppard* case,¹⁵ "exclusion of such evidence in court is rendered meaningless when news media make it available to the public." Though the Court stated that "... reporters who wrote or broadcast prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the

proceedings,"¹⁶ it also reiterated that what transpires in the courtroom is public property. If the media are free to print all that transpires in open court during a suppression, confession or identification hearing, an exclusionary ruling will be worse than meaningless, indeed will be a trap for the defendant, unless the hearing is closed to the public, including representatives of the news media, or unless the hearing is deferred until after the jury has been selected and sequestered.

Too often overlooked as a possible solution to the problem presented by the pretrial exclusionary hearing is the expedient of deferring the hearing until after sequestration. Doing so will permit the news media to report all that transpires at the hearing, since the jury will then be isolated from their reports. This may present practical problems (1) because counsel will have less time for preparation after suppression has been granted or denied than they would have had had a pretrial hearing been held, and (2) because the jurors must endure the strictures of sequestration. Such considerations must be balanced in deciding when an exclusionary hearing should be held, but it should not be presumed, simply because the request is made prior to trial, that the hearing must be held pretrial.

When, after consideration, it is concluded that a pretrial hearing is to be held, exclusion of media representatives as well as the general public is essential because, notwithstanding the power and duty of the trial judge to warn concerning the impropriety of publishing evidence presented at such a hearing, and notwithstanding the willingness of some reporters to withhold, until completion of the trial, prejudicial information disclosed at such a hearing, not all reporters are willing to do so, and there is serious doubt whether a reporter's violation of an agreement to delay publication constitutes contempt.¹⁷ Moreover, the only correctives for a violation are change of venue or continuance. To seek the first, the defendant must give up his constitutional right to a trial by a jury of the state and district where the crime was committed; to seek the second, he must give up his constitutional right to a speedy trial.

In addition to the exclusionary hearings so far discussed, there may be a preliminary hearing concerning probable cause or for the purpose of

¹⁶ *Id.* at 362.

¹⁷ *See, e.g., Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966); *Azbill v. Fisher*, 84 Nev. 414, 442 P.2d 916 (1968).

¹⁴ *See* ABA STANDARD 2.1(b).

¹⁵ *Supra* note 2, at 360.

fixing bail. Such hearings do not necessarily involve evidence that may be excluded at the trial and it, therefore, cannot be said, as it can with respect to exclusionary hearings, that every such hearing should be closed upon defendant's request. With respect to a preliminary or bail hearing, a motion that the hearing be closed should, however, be granted unless the judge determines that there is no substantial likelihood of interference with defendant's right to a fair trial by an impartial jury.

Of course, all that has been said about closed hearings assumes that the defendant has either moved that the hearing be closed or consented to the suggestion of the court or the prosecution to that effect. This is because the Sixth Amendment to the United States Constitution guarantees "the accused . . . the right to a speedy and public trial," which may well encompass pretrial hearings as well as the trial itself.

Although the federal constitutional right is a right of the accused and not of the public, some state constitutional and statutory provisions have been construed to require that trials be public notwithstanding defendant's consent to closure.¹⁸ But if it is a constitutional absolute that what transpires in open court is public property and may be immediately disseminated, and it is also a constitutional requirement that the admissibility of certain types of evidence be determined outside the presence of the jury, then it may well be that a state constitutional or statutory provision that is so construed is itself in violation of the Sixth Amendment's guarantee to the accused of trial "by an impartial jury."¹⁹ A trial judge in a state whose constitution is so construed should, therefore, carefully consider all aspects of the problem (including the possibility of deferring the hearing until the jury has been sequestered) and the effectiveness of available correctives, before ruling on a defendant's motion that a pretrial hearing be closed, and in ruling should make specific findings with respect to the likelihood of interference with defendant's right to a fair trial.

Whenever it is determined that a hearing should be closed, court personnel and the parties, attorneys and witnesses participating in the hearing should be directed, on the record, not to disclose what transpired at the hearing until the case is completed by verdict or other disposition.

Though a trial judge concludes that in a given case a closed pretrial hearing must be held, he should be alert to the role of the media to scrutinize law enforcement and judicial processes to protect the public interest in the integrity of those processes. That role and that interest he should protect by requiring (1) that a complete record be made, (2) that the trial itself be held as soon as possible after the pretrial hearing so that there be no undue delay in publication, and (3) that the record of the hearing be made available to the public, and media representatives notified of that fact, promptly after completion of the trial or the disposition of the case without trial.

Pretrial Motions

The publicity attendant upon criminal proceedings may result in a motion by defendant or by the state for a change of venue or a continuance, or in an attempt by defendant to waive trial by jury.

In many states, the practice has been to defer ruling on a motion for change of venue or continuance until after the empaneling of the jury, on the theory that the voir dire examination will reveal whether there is sufficient prejudice to require that the motion be granted. In recognition of the difficult position in which defense counsel is thus placed and of the difficulty, if not impossibility, of reaching through voir dire examination prejudices subconsciously harbored by jurors, the ABA Standards²⁰ recommend that a motion made before empaneling should be disposed of before empaneling, and that a motion made or reconsidered after empaneling should not be denied because a jury has been empaneled, if it appears from the record that there is a reasonable likelihood that, if the motion is not granted, a fair trial cannot be held. The Standards recommend also²¹ that the determination whether there is such a likelihood be based on such evidence as qualified public opinion surveys or opinion testimony of individuals (which however are not required as a condition of granting the motion), or on the court's own evaluation of the nature, frequency

¹⁸ Compare *E. W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 125 N.E.2d 896, 1955 appeal dismissed as moot, 164 Ohio St. 261, 130 N.E.2d 701 (1955), with *United Press Ass'n v. Valenti*, 308 N.Y. 71, 123 N.E.2d 777 (1954), and *Kirstowsky v. Superior Court*, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); and note that the mandamus issued in *Oxnard Publishing Co. v. Superior Court*, 68 Cal. Rptr. 83 (1968), was vacated and the proceeding dismissed as moot by the California Supreme Court³ 261 Cal. App. 2d 505, 68 Cal. Rptr. 83 (1968).

¹⁹ Cf. *Azbill v. Fisher*, *supra* note 17.

²⁰ ¶3.1(d).

²¹ ¶3.1(b) & (c).

and timing of the publicity in question, and that a showing of actual prejudice shall not be required. Those recommendations have been approved by the Supreme Court of California.²² Except as appellate court decisions in his state mandate him doing otherwise, a trial judge hearing a motion for change of venue or continuance, should consider those recommendations in reaching his conclusion.

In some states the right of a defendant to waive trial by jury is absolute; in others, there is in certain types of cases no right to waive; in still others, the consent of the prosecutor is required; still others require the approval of the court with or without the consent of the prosecutor. With the possible exception of the case in which the defendant's reasons for wanting a bench trial are so compelling that the prosecutor's insistence upon jury trial can be considered denial of an impartial trial, the prosecutor's refusal of consent must be respected.²³ When the prosecutor consents, or when under the law of the particular state his consent is not required, the criteria governing whether the trial judge should permit the waiver because of publicity claimed to be prejudicial are (1) whether the waiver has been made knowingly and voluntarily, and (2) whether there is reason to believe, based on evaluation of the publicity involved, that permitting the waiver will increase the likelihood of a fair trial.²⁴

Grand Jury Transcripts

In most states grand jury proceedings are secret, and the grand jury transcript is available only to the state and, at certain stages of the proceeding, to the defendant on order of the court. In some states, however, the statute requires secrecy only until defendant is in custody.²⁵ In such a state, the trial judge should consider whether an order should not be made directing the stenographer not to release to any persons other than the prosecutor and the defendant any portion of the transcript containing evidence that may be excluded at the trial (*e.g.*, a confession).²⁶

Exhibits

Under the circumstances of a particular case, an order impounding exhibits or proscribing the

photographing of exhibits or both may be necessary.²⁷

Names and Addresses of Prospective Jurors

The publication of the names and addresses of prospective jurors and of those persons empaneled as the trial jury, and their consequent exposure to telephone calls and letters, both anonymous and from friends, expressing opinion concerning defendant's guilt, is twice commented upon in the *Sheppard* decision²⁸ and the necessity for assuring that the addresses, and perhaps even the names, of the empaneled jurors, be held in confidence in order to protect the integrity of the trial was stated in *United States v. Borelli*.²⁹ On the other hand, the Supreme Court of Illinois directed³⁰ in the *Speck* case, in which the jurors were to be sequestered, that "the names of prospective jurors not to be reported until such individuals are either excused or sworn as jurymen and sequestered", apparently leaving in effect that part of the trial court's order which directed that jurors' addresses not be released until after verdict. The trial judge should, therefore, protect the privacy of jurors, prospective and selected, by directing (1) that court personnel not release the names and addresses of prospective jurors; (2) that in the selection process the address of a prospective juror be furnished counsel in writing but not be stated by counsel or the prospective juror during the selection process, and not be released by counsel or court personnel until after verdict, whether the jurors are sequestered or not; and, perhaps (3) when jurors are not to be sequestered, similarly holding the names of selected jurors in confidence. However, as a practical matter in a trial of any length it may be almost impossible to prevent identification by someone interested in ascertaining identity. In those states in which the procedure is to publicize the names of the entire panel of veniremen as soon as it is drawn, the trial judge will have to consider on what authority that is done and its effect on the fairness of the particular trial.

Use of Courtroom and Courthouse Facilities

The public interest in sensational trials furnishes no basis for moving a trial to a theatre or

²² *Maine v. Superior Court*, 66 Cal. Rptr. 724, 438 P.2d 372 (1968).

²³ *Singer v. United States*, 380 U.S. 24, 37 (1965).

²⁴ See ABA STANDARD ¶3.3.

²⁵ *E.g.*, CAL. PENAL CODE §938.1.

²⁶ See *Craemer v. Superior Court*, 265 Cal. App. 2d 234, 1 Cal. Rptr. 193 (1968).

²⁷ See discussion in text, *supra* at 290.

²⁸ *Supra* note 2, at 342.

²⁹ 336 F.2d 376 (2d Cir.), cert. denied, *sub. nom.* Cinquegrano v. United States, 379 U.S. 960 (1964).

³⁰ The unreported order was made in an original proceeding entitled *People ex rel. The Tribune Co. v. Paschen*, No. 40507, Ill. Sup. Ct., March 1, 1967.

other similar accommodation outside the courthouse,³¹ though it would not be improper to schedule the trial for the largest courtroom in the courthouse if in the discretion of the trial judge doing so would not sacrifice the judicial serenity and calm to which a person accused is entitled.

"[A] trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities are not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings."³²

Both the courtroom and the courthouse are subject to control by the court. The area within the bar of the courtroom must be kept clear of spectators and newsmen so that counsel, parties and witnesses can confer in confidence, and to assure that exhibits not be handled by unauthorized persons. Outside the bar, available seats should be divided on a reasonable basis between spectators and newsmen, and within the area allocated to news representatives specific seat assignments should be made. In some cases, more news representatives may wish to attend than there are seats available, and in some cases a system of credentials for newsmen may make easier their movement in and out of the courtroom. While there is authority to limit the number of news representatives in the courtroom and to establish some reasonable identification system for them, any assignment of facilities, whether in or out of the courtroom, should be on an equitable basis. In this connection and in ascertaining what media representatives wish to be present, the trial judge may obtain invaluable assistance from the local Bar-Press Committee, or from representatives of local associations of journalists and broadcasters.

In most states, the taking of photographs in the courtroom, during sessions or during recess, or the broadcasting or televising of trials is prohibited, and in many states the taking of photographs anywhere in a courthouse at any time is proscribed. Some newsmen may not be aware of that fact, however, and the judge's order should, therefore, bring the matter to their attention. Where state procedure permits the taking of photographs in, or broadcasting or televising from, the courtroom (1)

television should never be permitted without defendant's consent,³³ and (2) the trial judge must establish and enforce "ground rules" concerning when, where, and with respect to what the equipment may be used, in order to assure that it does not become such a disruptive influence as to amount to a denial of due process.³⁴ He might consider requiring that one "pool" photographer be agreed upon to serve all the media.

Sketch artists are sometimes employed by the media where cameras are not permitted. There should be no blanket prohibition against such artists since their product is simply a pictorial rather than a verbal method of reporting what took place. On the other hand, an artist who works at an easel may distract the jury or unnerve a witness, or available space may be limited. While some judges have entered orders barring them, the objective of an orderly trial can be achieved by specifying that the artist must work in a seated position and without an easel. If so many requests are received that the number of artists would cause distraction, the court might require the use of a "pool" artist.

The use of other courthouse facilities should likewise be dealt with by order. There is no obligation on the court to provide extra facilities, but neither is there reason to make the newsmen's work more difficult. Thus, if there is a press room in the courthouse, there is no reason to forbid installation of additional phones, or, when it can be done without disruption of court functions, to prohibit a telephone company trailer with additional phones to be parked on court grounds. The cardinal principles are that press facilities should not be close to the jury room or bring newsmen into close contact with jurors, that the corridors be kept clear so that other courts can function properly and decorum be maintained, and that any facilities made available be allocated equitably among newsmen.

Newsmen should be aware, before the trial begins, of what they can expect and what is expected of them. Accordingly, the order should cover not only the matters so far considered, but also how media representatives should conduct themselves in the courtroom. Since movement by a large number of people within or in and out of the courtroom may be distracting, the court may wish to suggest that movement be kept to an absolute minimum. Alternatively the court may direct that

³¹ *Estes v. Texas*, *supra* note 1, at 572-73.

³² *Id.* at 584.

³³ *Estes v. Texas*, *supra* note 1.

³⁴ *Ibid.*; *Sheppard v. Maxwell*, *supra* note 2.

no one be permitted to enter or leave, except in an emergency, while the court is in session, but if that is done, an effort should be made to find out what deadlines media representatives must meet and to arrange recesses, so far as feasible, with those deadlines in mind. Copies of the order should be delivered in advance of the trial to each newsman who seeks to attend.

CONDUCT OF THE TRIAL

Sequestering Jurors

Sequestration is, if properly carried out, the most effective means of shielding jurors from extraneous prejudicial matter appearing in newspapers or on radio or television during the trial and, in some cases, may be the answer to the problems usually arising from exclusionary hearings. It is a matter the trial judge should raise *sua sponte* with counsel.³⁵ Though it involves expense for the state and inconvenience for the jurors and may make it more difficult to obtain a jury, and for these reasons should not be routinely ordered, it should be ordered whenever it appears likely that, unless the jurors are sequestered, highly prejudicial matter may come to their attention.

To be effective, however, sequestration requires more than simply confining the jurors to a guarded hotel area or in some public facility. It requires also that newspapers that jurors are allowed to see be scanned and prejudicial matter excised, that radio and television be kept from the jurors or monitored so that news broadcasts concerning the case can be excluded, that records be kept of which jurors receive mail and telephone calls and that the mail be censored and the calls be listened in on by a court employee, that newspapers be excluded from the courtroom and other areas where jurors may in passing see a prejudicial headline, and that contact between jurors and newsmen not be permitted. In view of the substantial incursions on juror privacy and convenience, the jurors should be told that sequestration is intended to shield them from harassment and to preclude direct or indirect communications to them that might disadvantage either side. They should not be told at whose instance, unless it be at the instance of the court, sequestration has been ordered.

Selection of Jurors

As noted above,³⁶ the addresses of prospective jurors should not be stated during the selection

process nor released until verdict, and when jurors are not sequestered it may also be proper to hold in confidence the names of the jurors selected.

Examination of prospective jurors as to pretrial publicity of a potentially prejudicial nature should be conducted individually, outside the presence of other prospective or selected jurors. The purpose of the examination is to ascertain what publicity each prospective juror has seen or heard or heard about and what effect it has had on his ability to judge the case impartially.³⁷ The questions, whether by judge or attorney, should seek only to ascertain the juror's exposure and state of mind, not to convince him that he should be able to cast aside preconceptions. Determination of the juror's acceptability is the responsibility of the trial judge in ruling on challenges for cause. In making that determination, the judge is not bound by the juror's answers. A juror who states that he has formed an opinion but that he will be able to decide impartially should nonetheless be excused if the publicity which he recalls is of a highly inflammatory nature,³⁸ or concerns incriminatory matter of significance (e.g., confession, identification, prior criminal record) that may be inadmissible in evidence. A juror who states that he will be unable to overcome his preconceptions should be excused though his exposure has been slight. A juror who has been exposed only to information that will be introduced during the trial or which, though possibly inadmissible, creates no substantial risk of prejudice should be seated if the judge concludes that, though the prospective juror admits to having formed an opinion, he can decide the case impartially. Any doubt should, however, be resolved against acceptability.

If the panel from which the trial jury is to be selected is of sufficient size that it is reasonable to expect selection to be completed without additional veniremen being called, examination of prospective jurors should proceed in open court. The entire panel should be cautioned before the selection process begins that so long as there is any possibility of his being selected as a trial juror in the particular case no juror should read, watch or listen to newspaper, radio or television broadcasts concerning the case. If, however, the size of the panel and the nature of the pretrial publicity make it likely that more than one panel will have

³⁷ See ABA STANDARD ¶3.4; *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968).

³⁸ See, e.g., *Irvin v. Dowd*, 366 U.S. 717 (1961).

³⁵ *Sheppard v. Maxwell*, *supra* note 2, at 363.

³⁶ Text, *supra* at 292.

to be drawn before selection of the trial jury is completed, the trial judge may find it necessary to exclude the public, including media representatives, from the courtroom during the selection process so that the impartiality of those who may be drawn as additional veniremen will not be disturbed by reading, hearing or seeing reports concerning the examination of prospective jurors with respect to pretrial publicity. Whether the selection process takes place in open court or in closed session, a verbatim record of the voir dire examination should be made for appeal purposes. If selection occurs during closed session, the transcript should be released, and the media advised of its release, immediately after verdict if the trial jury is not sequestered, or immediately after the selection is completed if the jury is then sequestered.

Extrajudicial Statements; Exhibits; Use of Courtroom and Courthouse Facilities

What has been written earlier with respect to these topics³⁹ applies as well to the period of trial.

Cautioning Jurors

If the jury is not to be sequestered, they must be cautioned, clearly and firmly, against (1) reading newspaper accounts, or listening to or watching any radio or television broadcast, about the trial, (2) discussing the case with anyone, or permitting any interview by a newsman on any subject during the course of the trial. At the end of each day's session and at other recesses, as appropriate, the jurors should be reminded of those admonitions. A pattern instruction with respect to newspaper, radio and television accounts of the case is set forth in ¶3.5(e) of the ABA Standards. Furthermore, the jurors should not be permitted to take newspapers with them into the jury room.⁴⁰

In many states, trial jurors (as distinct from grand jurors) are not required to maintain secrecy concerning jury deliberations once the verdict is in. The trial judge should advise the jurors, after they have returned their verdict, what the law of his state is on the subject. If disclosure is permitted, he should also advise the jurors that they are not required to discuss the case with anyone, that their deliberations are carried out in the secrecy of the jury room to permit the utmost freedom of debate between jurors and so that each juror can

express his views without fear of public scorn or the anger of the defendant or any public official, and that in deciding whether to answer questions concerning the case, and if so what to disclose, they should have in mind their own interests and the interests of the other members of the jury.

Questioning Jurors About Publicity Occurring During Trial

When it comes or is brought to the court's attention that material which goes beyond the evidence presented to the jury and which may seriously disturb its impartiality may have reached some or all of the jurors, the court should question each such juror, separately and out of the presence of any other jurors, about his exposure to the material. Such an inquiry should be made on motion of the state, of the accused, or on the court's own motion. The state has the burden, with respect to publicity from which prejudice might arise, of showing that defendant's rights have *not* been prejudiced.⁴¹ Moreover, since the state has that burden, the fact that defendant declines the court's offer to question the jurors concerning the publicity does not, it appears, obviate the necessity for the inquiry.⁴² While the inquiry should be conducted by the trial judge, and should be held in camera to assure frankness on the part of the juror in answering questions and to prevent further prejudice to defendant through media reports of the questioning,⁴³ counsel must be permitted to be present and to suggest lines of inquiry to the judge if they so desire, and a verbatim transcript must be kept for purposes of appeal. The basis for excusing a juror who has been exposed to such publicity is the same as the standard of acceptability with respect to opinions formed on the basis of pre-trial publicity,⁴⁴ except that if the publicity is such that a mistrial would have to be declared if it had been referred to during trial, a juror who has seen or heard it should be excused. In proceeding on its own motion or ruling on a motion by the state, the court should, however, bear in mind that if the excusal of jurors reduces the number of jurors to less than twelve a mistrial must be declared (absent defendant's consent to a jury of less than twelve). A mistrial at that stage, without defendant's express consent, unless unequivocally in

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Id.* at 644; *Coppedge v. United States*, 272 F.2d 504, 508 (D.C. Cir. 1959), *cert. denied*, 368 U.S. 855 (1961).

⁴⁴ Discussed in text, *supra* at 294.

³⁹ Text, *supra* at 289, 292-294.

⁴⁰ *Silverthorne v. United States*, *supra* note 37.

defendant's interest, may on the principle of double jeopardy, preclude a retrial.⁴⁵

Trial Transcript

Newsmen often purchase a copy of the trial transcript in order to assure the accuracy of their reporting,⁴⁶ and since what transpires in the courtroom is public property, it is clear that they should be permitted to do so. The only situation in which newspaper reports of testimony, either verbatim or in narrative form can present a trial difficulty is when witnesses have been excluded from the courtroom during trial. That situation may, however, be dealt with by sequestering the witnesses,⁴⁷ and is no reason for denying to newsmen the right to purchase a copy of the transcript.

The transcript available to newsmen, however, is only that of proceedings in open court. The trial judge should, therefore, establish with the court reporter some procedure that will insure that in the rush of preparing daily copy the reporter does not inadvertently release the transcript of closed portions of the trial. The mechanics of the system should be agreed upon in advance of trial and incorporated in a court order so that the court reporters clearly understand their obligations and newsmen will be aware exactly what will be available to them.

Taped transcription of what transpires in the courtroom generally should not be permitted, however, in view of the noise and space problems they may present and the psychological problem for witnesses that may be created by the presence of tape recorders,⁴⁸ and of the added, and often more dramatic, emphasis that may be given by the broadcast media through the isolated use of the more sensational portions of such a tape.⁴⁹

Hearings Out of the Presence of the Jury

What has been stated above⁵⁰ with respect to pretrial hearings applies as well to hearings, whether of witnesses or of attorneys' arguments, held during the trial out of the presence of the jury, if the jury has not been sequestered. If the trial judge determines that the evidence to be ad-

duced or the argument to be made at such hearing is likely to interfere with the defendant's right to fair trial, then on defendant's motion, or with defendant's consent, the trial should be closed to the public including representatives of the news media, and the judge should, on the record, caution those present against disclosing prior to conclusion of the case specified information adduced during the closed hearing. Whenever a closed hearing is held a verbatim transcript should be kept and that transcript should be released, and newsmen informed of its release, promptly after the disposition of the case.

Witnesses and Parties

A defendant in a criminal proceeding has the right to be present during all proceedings, whether in open or closed session. Witnesses may, however, be excluded from the courtroom, so that one witness cannot tailor his testimony to that of a preceding witness. When a witness is barred and that portion of the trial from which he is excluded extends beyond one day, he should be sequestered since there is no other way of assuring that he will not learn through news reporting what the preceding witness' testimony was.

Either a witness or a party may, however, be ordered by the court not to grant interviews or make extrajudicial statements to news media representatives during trial,⁵¹ and either a witness or a party may be ordered by the court not to disclose testimony given at a closed hearing.

FORM OF THE COURT ORDERS

What is required is not one but several different orders, some of which can be addressed to more than one group or include more than one subject; others will be addressed to a particular group or individual. Some, like the direction to a witness testifying at a closed hearing, may be stated orally on the record, but most should be prepared in writing and formally served on the persons who are intended to be governed by them.

The many varying fact situations that may be met make it impractical to suggest specific wording. Some general suggestions can, however, be offered. First, the temptation to adopt the form of order used in some prior sensational murder trial (e.g., the *Sheppard*, *Coppolino*, *Speck*, *Sirhan* trials) should be resisted, in light of the differences

⁴⁵ Compare *Mares v. United States*, 383 F.2d 805 (10th Cir. 1967) and *People ex rel. Totalis v. Craver*, 174 Misc. 325, 20 N.Y.S.2d 533 (1940), with *Gori v. United States*, 367 U.S. 364 (1961).

⁴⁶ See *Sheppard v. Maxwell*, *supra* note 2, at 620. See text, *infra* at 296.

⁴⁸ See *Estes v. Texas*, *supra* note 1.

⁴⁹ *Ibid.*

⁵⁰ Text, *supra* at 290-291.

⁵¹ *Sheppard v. Maxwell*, *supra* note 2, at 359, 361, 363.

in the constitutional, statutory and decisional law of the various states and of the embryonic state of federal constitutional law on the subject now and at the time they were drafted.

Secondly, each order should be tailored to the particular case. While the conduct of attorneys and others subject to judicial control may be regulated by special court order or rule,⁵² there is some question concerning the validity of a general injunction addressed to law enforcement officials as well as attorneys and intended to apply to all cases in a given county.⁵³

Thirdly, though the judge should warn newsmen of the impropriety of, and the possibility that reversal may result from, publishing material not introduced in evidence at the trial, it is far from clear that such a warning can be made the basis of a contempt proceeding even though the news report concerns something that occurred outside the courtroom, and it seems clear that it cannot be if the news report is about something that occurred in open court.⁵⁴ There is little value, therefore, in repeating in the order (as some of the orders made in recent sensational cases have done) precatory language from the *Sheppard* opinion⁵⁵ that the news media must be "content with the task of reporting the case as it unfolded in the courtroom—not pieced together from extrajudicial statements." More effective will be to state in any such warning the specific material referred to (e.g., prior criminal record), accompanying the statement with an explanation of the effect publication may have on juror impartiality and a request for cooperation. Even such a specific statement will furnish a basis for contempt only in limited situations,⁵⁶ but it is much more likely to result in cooperation than will a general one.

Fourthly, the order should not be unnecessarily restrictive. It should incorporate only provisions that are reasonably necessary to maintain decorum and obviate prejudice and which the court expects to enforce. As already noted, though the making of sketches is subject to limitation, absolute exclusion of a sketch artist may not be necessary.

Some orders have required that everyone entering the courtroom be searched. There may, of course, be cases involving such high community feeling that search is necessary as a security measure, to prevent escape or possible violence in the courtroom. But if the purpose is to exclude cameras and recording devices, a sign at the courtroom entrance so stating should be sufficient, at least until there is some indication to the contrary. Some orders have proscribed particular activities, such as the taking of photographs, not only in the courtroom or the courthouse but in parking or other areas adjacent to the courthouse. While picketing or other coercive activity outside the courthouse may be proscribed,⁵⁷ neither decorum of the trial nor protection against prejudice necessitate an order prohibiting the taking of photographs beyond the confines of the courthouse itself.

The desirability of bringing the specific orders directed to newsmen to their attention in advance of trial has been noted. They should also be furnished with copies of orders directed to jurors, parties, attorneys, law enforcement officials, so that they will be aware of the limitations on what each of those classes of persons may release.⁵⁸ With respect to witnesses and jurors, provision should be made for service of a copy of the governing order with the subpoena, and with respect to parties, attorneys and law enforcement personnel, personal service of the order should be made.

CONTEMPT

With respect to any party, attorney, witness or juror who violates a valid court order of which he is aware, contempt proceedings are available. With respect to attorneys, disciplinary proceedings might also be proper. With respect to law enforcement and other governmental personnel, unless separation of powers makes the underlying court order invalid, contempt is available, and there may also be departmental disciplinary proceedings.

With respect to newsmen, however, the Supreme Court in the *Sheppard* case⁵⁹ noted its unwillingness "to place any direct limitations on the freedom traditionally exercised by the news media." Therefore, contempt proceedings should not be taken against a newsman who reports statements

⁵² *Sheppard v. Maxwell*, *supra* note 2.

⁵³ See text, *supra* at 288-89; and see *County of Los Angeles v. Superior Court*, 253 Cal. App. 2d 670, 62 Cal. Rptr. 435, (1967) *hearing denied*, 62 Cal. Rptr. 449 (Sup. Ct.) (1967).

⁵⁴ See MEDINA REPORT 46-47; *Phoenix Newspapers Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966); *Shaw v. Commonwealth*, 238 N.E.2d 876 (Mass. 1968).

⁵⁵ 384 U.S. at 362.

⁵⁶ See text, *infra* at 297.

⁵⁷ *Cox v. Louisiana*, 379 U.S. 559 (1965).

⁵⁸ See text, at 296.

⁵⁹ 384 U.S. at 350.

made to him by others, unless it can be proven (1) that his purpose in reporting the statement was deliberately to sabotage the trial⁶⁰ or (2) that

⁶⁰ See ABA STANDARD ¶4.1(a)—“...wilfully designed by that person to affect the outcome of the trial;” and see *Worcester Telegram & Gazette, Inc. v. Commonwealth, Mass.* (68), 238 N.E.2d 861 (1968). While such situations are rare, they do occur. See, for example, Newsweek’s report concerning the second trial of Thomas Wansley:

“At the retrial in mid-March, the two papers constantly reprinted details of the first trial, referred to defense assertions as innuendo and repeatedly identified Wansley’s New York lawyer, William M. Kunstler, as having ‘been linked on numerous

knowing that the person from whom he received the information was under court order not to disclose the information, he nevertheless procured that person to violate the order. In the latter situation what is punished is the newsman’s subornation of his informant’s contempt, not the newsman’s publication of the data thus obtained, and there should, therefore, be no constitutional problem involved in the use in such a situation of the contempt power.

occasions to Communist-front organizations and efforts’.”

Newsweek, May 8, 1967, at 88.